SUPREME COURT, U.S.
JAN 16 2003

No. 02-585

In the Supreme Court of the United States

PEABODY COAL CO., PETITIONER

v.

ROBERT D. GRAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals concerning the weight to be accorded the medical opinion of a treating physician in adjudicating a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is proper and consistent with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

2. Whether the Department of Labor's regulation addressing the opinion of a treating physician, 20 C.F.R. 718.104(d), conflicts with Section 7(c) of the APA or otherwise is arbitrary or capricious or not in accordance with law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the *Federal Reporter*, but is available at 35 Fed. Appx. 138. The decisions and orders of the Benefits Review Board (Pet. App. 8-15, 39-45) and the administrative law judge (Pet. App. 16-34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2002. A petition for rehearing was denied on July 26, 2002 (Pet. App. 35-36). The petition for a writ of certiorari was filed on October 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 12, 1997, respondent Robert D. Gray, who had been a coal miner for 26 years, Pet. App. 20, filed a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* The BLBA provides for payment of benefits to "coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a); 20 C.F.R. 718.1.[1] On September 20, 1999, an administrative law judge (ALJ) denied respondent's claim. Pet. App. 16. The ALJ determined that Gray did not suffer from pneumoconiosis.

The ALJ reached that conclusion on the basis that the weight of the x-ray evidence failed to establish the presence of pneumoconiosis and that the physicians possessing superior medical credentials (Drs. Branscomb and Fino) opined that Gray's respiratory condition was unrelated to coal mine employment. Pet. App. 28-29. Dr. Simpao, respondent's treating physician, made a contrary diagnosis of coal workers' pneumoconiosis, which the ALJ found to be well documented and well reasoned. *Id.* at 29. Without acknowledging Dr. Simpao's status as the treating physician, the ALJ found "no reason to give [his opinion] any additional weight," because, unlike Drs. Branscomb and Fino, he was not a board certified specialist in internal or pulmonary medicine. *Ibid.* The ALJ also determined, based on the recent medical evidence, that Gray had a totally disabling respiratory condition, but, after considering all the prior and new evidence, he denied

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[1] Because Gray had filed a previous claim for benefits, the claim at issue in this case was considered a "duplicate claim" requiring a showing of a "material change in condition[s]." Pet. App. 20; see 20 C.F.R. 725.309(d). The ALJ found a material change in conditions. Pet. App. 32.

benefits because the disability was not due to pneumoconiosis. *Id.* at 32-33.

2. On November 6, 2000, the Benefits Review Board (Board) issued a per curiam decision affirming the ALJ's denial of benefits. Pet. App. 10-15. The Board ruled that the ALJ had properly accorded greater weight to the medical opinions of the physicians with superior medical credentials. According to the Board, the ALJ was not required "to mechanistically give greater weight to Dr. Simpao's opinion" because he was the treating physician, or to discredit the reports of the better-credentialed physicians simply because they had not examined the claimant. *Id.* at 13-14 & n.4.

3. The court of appeals remanded in an unpublished opinion. Pet. App. 1-7. According to the court, the ALJ had "erred in weighing the medical opinion evidence." *Id.* at 5. In particular, the court found, the ALJ had failed to accord proper weight to the opinion of the treating physician, Dr. Simpao.

The court explained that its previous decisions did not mean "that treating physicians should automatically be presumed to be correct." Pet. App. 5 (quoting *Peabody Coal Co.* v. *Groves*, 277 F.3d 829, 834-835 (6th Cir. 2002), cert. denied, No. 02-249 (Jan. 13, 2003)). Instead, the court observed, ALJs must "examine the medical opinions of treating physicians on their merits and * * * make a reasoned judgment about their credibility." Pet. App. 6 (quoting *Groves*, 277 F.3d at 834). As a result, "an ALJ may discount a treating physician's opinion where that opinion is not well reasoned or well documented, or is problematic in some other way." Pet. App. 6. But "[w]here the ALJ determines that the treating physician's opinion is well reasoned and well documented," the court stated, "the ALJ must give more weight to that opinion than to those of other

physicians, even where those other physicians have superior qualifications." *Id.* at 7.

In this case, the court found, the ALJ should have given additional weight to the treating physician's opinion after having determined that the opinion was well documented and reasoned. Pet. App. 7. The court therefore directed the ALJ to reweigh the evidence after giving additional weight to Dr. Simpao's opinion, and to reconsider the weight initially given to the opinions of the non-treating specialists, Drs. Branscomb and Fino, in light of their failure to consider all the relevant x-ray reports, including three "apparently credible x-ray reports favoring the claimant." *Ibid.*

ARGUMENT

Petitioner seeks this Court's review of both the court of appeals' decision concerning the opinion of a treating physician in BLBA adjudications and the Department of Labor's new regulation addressing treating physicians' opinions. Review of petitioner's claims is not warranted. As petitioner acknowledges (Pet. i n.*), in *Peabody Coal Co.* v. *Groves*, *supra*, which also arose from the Sixth Circuit, petitioner raised the same two questions that it now raises in this case. The Court denied the petition for certiorari in *Groves*, and there is no reason for a different result here.

1. Petitioner asserts (Pet. 10-14) that the approach of the Sixth Circuit concerning the opinion of a treating physician conflicts with the approach of other courts of appeals. That contention lacks merit and does not warrant this Court's review.

a. The courts of appeals, including the Sixth Circuit, are in agreement that there is no automatic presumption favoring the opinion of a treating physician, but that the treating physician's opinion, if adequately

documented and supported, may be entitled to controlling weight where justified by the record in a particular case because the treatment relationship might afford the physician superior insight into the claimant's condition. Accordingly, the District of Columbia Circuit, in reviewing the decisions of the courts of appeals, found a "consensus among [the] courts * * * that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant." *National Mining Ass'n (NMA)* v. *Department of Labor*, 292 F.3d 849, 861 (2002) (per curiam). In concluding that the courts of appeals agree in their approach to the opinions of treating physicians, the District of Columbia Circuit relied on essentially the same decisions relied on by petitioner. See *id.* at 861-862 (discussing *Sterling Smokeless Coal Co.* v. *Akers*, 131 F.3d 438 (4th Cir. 1997); *Peabody Coal Co.* v. *McCandless*, 255 F.3d 465 (7th Cir. 2001); and *Groves*, 277 F.3d at 829); Pet. 3-4, 10-12.

In this case, the ALJ failed to consider whether Dr. Simpao's opinion as the treating physician was entitled to additional weight in light of the evidence and the record. The ALJ took no note of Dr. Simpao's status as treating physician, instead stating only that "there is no reason to give [his opinion] any additional weight." Pet. App. 29. Because the ALJ apparently did not consider the nature of the treatment relationship and whether it could have afforded Dr. Simpao superior insight into Gray's medical condition, the Sixth Circuit properly remanded for a reweighing of the medical opinions.

The court of appeals' opinion goes on to suggest, however, that the opinion of a treating physician, if well

documented and reasoned, necessarily must be given more weight than the opinion of other physicians, regardless of the evidence and the record. Pet. App. 5-7. That suggestion is not consistent with the court's approach in subsequent precedential decisions.

In *Wolf Creek Collieries* v. *Director, OWCP*, 298 F.3d 511 (6th Cir. 2002), issued more than three months after the court of appeals' decision in this case, the court specifically denied the existence of an automatic presumption favoring the opinion of a treating physician. The court made clear that "the misconceived 'treating physician presumption' does not exist, and we have never mandated that automatically controlling weight be accorded such opinion." *Id.* at 521. The court affirmed the ALJ's decision to give greater weight to the treating physician's opinion in that case because the treating physician had examined the miner on "numerous occasions" in the years preceding his death, whereas other physicians had not examined the miner at all or had examined him on only one occasion several years before his death. *Id.* at 522. The court explained that it was "thus clear that the ALJ did not give presumptive weight to [the treating physician's] opinion. While he did accord more weight to his opinion, he examined all of the opinions and made reasoned judgments as to their credibility." *Ibid.*

More recently, in *Jericol Mining, Inc.* v. *Napier*, 301 F.3d 703 (6th Cir. 2002), petition for cert. pending, No. 02-834, the court "rejected the contention that [an ALJ is] require[d] * * * to give absolute deference to the opinion of a treating physician." *Id.* at 709 (citation omitted); see *ibid.* (describing as "mistaken" the "belief that an automatic treating-physician presumption exists"). Of particular significance, the court specifically held that the ALJ had erred by giving "extra

weight" to the opinion of a treating physician based solely on the existence of the physician-patient relationship, without considering "the factors that are relevant in determining whether her opinions as [the] treating physician are entitled to greater weight, considerations such as the nature and duration of the relationship, as well as the frequency and extent of the treatment." *Id.* at 710.

Napier and *Wolf Creek* establish that the Sixth Circuit does not exhibit a "strong preference based on status" alone. Pet. 14. Instead, the opinion of a treating physician may be entitled to added weight if the evidence and the record in a particular case warrant that conclusion. Moreover, whereas *Napier* and *Wolf Creek* are published and establish circuit precedent, the decision below is not published and therefore does not establish precedent. See, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 451 (6th Cir. 2002). The Sixth Circuit's approach, as *Napier* makes clear, thus is "in line with the views of [its] sister circuits that have considered the relevance of a treating physician's opinion." *Napier*, 301 F.3d at 709. As a result, there is no conflict warranting this Court's review.

b. Even if there were a conflict among the courts of appeals, this case would not present an appropriate vehicle for addressing the issue. As a general matter, this Court awaits a final decision before granting certiorari in a case. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J. respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Brotherhood of Locomotive Fireman & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this

Court."). In this case, the court of appeals remanded the case to the ALJ for further consideration of the claim.

There is no reason in this case to depart from the Court's general practice of awaiting final judgment. The denial of certiorari at this time would not preclude petitioner from raising the same issues in a later petition, after the Board renders a final decision on remand. Moreover, the remand affords the ALJ the opportunity to assess in the first instance, and for the first time, whether Dr. Simpao's treatment relationship might have afforded him superior insight into the claimant's medical condition in the particular circumstances of this case.

c. The Sixth Circuit's decision does not warrant review for the added reason that, in BLBA cases in which the evidence was developed after January 19, 2001, the weight to be accorded the opinion of a treating physician is governed by the Department of Labor's treating physician regulation, 20 C.F.R. 718.104(d). The regulation requires the adjudication officer to "take into consideration" a number of specific factors "in weighing the opinion of the miner's treating physician" —*viz*, the "[n]ature of the relationship" between the physician and the miner in respect to whether the physician "treated the miner for respiratory or pulmonary conditions," the "[d]uration of [the] relationship," the "frequency of physician-patient visits," and the "types of testing and examinations conducted during the treatment relationship." 20 C.F.R. 718.104(d)(1)-(5). The regulation provides that, "[i]n appropriate cases, the relationship between the miner and his treating physician *may* constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight," but

only "provided that the weight given to the [physician's] opinion * * * shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. 718.104(d)(5) (emphasis added). Because the regulation will govern in all BLBA cases in which the evidence was developed after January 19, 2001, any flaw in the Sixth Circuit's approach in this case—and any disagreement between the opinion below and the decisions of other courts of appeals—is of little (and diminishing) continuing significance.

2. Petitioner also seeks review on the basis (Pet. i, 15-16) that the Department's treating physician regulation, 20 C.F.R. 718.104(d), is arbitrary and capricious and is in conflict with Section 7(c) of the APA. The regulation only applies in cases in which the evidence was developed after January 19, 2001, however, and thus has no application to this case. 20 C.F.R. 718.101(b). Accordingly, the court of appeals' opinion does not rely on, or even mention, the regulation. There thus is no basis for reviewing the regulation's validity in this case.

In addition, there is no disagreement among the courts of appeals on the validity of the regulation under the APA. The District of Columbia Circuit upheld the regulation against a facial challenge, *NMA*, 292 F.3d at 870-871, and no court has reached a contrary conclusion. The regulation's application in a particular case has yet to be reviewed by any court of appeals.[2]

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[2] For the reasons explained in the government's brief in opposition (at 12-16) in *Groves*, No. 02-249, moreover, there is no merit to petitioner's argument that the treating physician regu-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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lation is arbitrary and capricious or inconsistent with Section 7(c) of the APA.